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Specially Appearing for Defendant
CHARMING SHOPPES OF DELAWARE, INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SHAMEIKA MOODY, as an individual and on behalf of others similarly situated,

Plaintiff,

vs.

CHARMING SHOPPES OF DELAWARE, INC., a corporation, and DOES 1 through 20, inclusive,

Defendant.

Case No. C 07-06073 MHP

DEFENDANT CHARMING SHOPPES OF DELAWARE, INC.'S REPLY IN SUPPORT OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION

Date: February 11, 2008
Time: 2:00 p.m.

[Fed. R. Civ. Proc. 12(b)(2)]
[SPECIAL APPEARANCE ONLY]

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I. INTRODUCTION

Plaintiff Shameika Moody ("Plaintiff") takes a "kitchen sink" approach in her opposition to Defendant Charming Shoppes of Delaware, Inc.'s ("Defendant") motion to dismiss for lack of personal jurisdiction. Plaintiff asserts that Defendant was the joint employer, principal, parent and/or subsidiary, alter-ego, and co-conspirator of her actual employer, Lane Bryant, Inc. ("Lane Bryant"), such that Lane Bryant's contacts with California should be imputed to Defendant. All of these theories are premised on the same fact—that Defendant provides certain *administrative services* to Lane Bryant (as well as sister companies). However, courts have consistently held that "a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction." *Central States, Southeast and Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 945 (7th Cir. 2000), *cert denied* 532 U.S. 943, 121 S.Ct. 1406 (2001).

Plaintiff also seeks to muddy the waters by making arguments about Defendant's alleged liability under California law. This alleged liability stems from Defendant's provision of payroll services to Lane Bryant, and so does not establish personal jurisdiction under the law. Further, the Ninth Circuit has made clear that liability and jurisdiction are independent questions, and that pleading a theory of liability is not sufficient to establish personal jurisdiction. *See American Telephone & Telegraph Co. v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 590-591 (9th Cir. 1996). Plaintiff's repeated reference to Plaintiff's pay stub and Labor Code section 226 does not change this analysis. Section 226 only regulates the conduct of (and allows for statutory liability as to) the "employer"—it does not apply to a third-party service provider, which is the role performed by Defendant here. To the extent Plaintiff asserts an alleged violation of Section 226, that is an alleged statutory claim to be taken up with Lane Bryant, Inc., and cannot be converted into a tort claim against Defendant. Moreover, regardless of whether an alleged statutory or tort claim may be brought based upon the information on Plaintiff's pay stub, pleading such a claim does not establish, and is irrelevant to, the question of personal jurisdiction. Personal jurisdiction depends on whether a defendant has sufficient contacts with the forum state. Here, Defendant

does not have "substantial" or "continuous and systematic" contacts with California and has not purposely availed itself of the privileges of doing business in California. As there is no general or specific personal jurisdiction over Defendant, the Court must dismiss Defendant from this action.[1]

II. DEFENDANT'S PROVISION OF ADMINISTRATIVE SERVICES TO LANE BRYANT IS INSUFFICIENT TO ESTABLISH PERSONAL JURISDICTION

Plaintiff claims that Defendant has had "significant systematic and continuous contacts" with California by issuing paychecks and wage statements to Lane Bryant employees and by paying employment taxes. *See* Opp., pg. 11. But, Plaintiff cites no authority for the proposition that payroll processing or payment of employment taxes is sufficient to establish personal jurisdiction.

To the contrary, courts have consistently held that the provision of administrative services—including by one corporation to a sister or subsidiary corporation—is "not sufficient minimum contacts to support the exercise of jurisdiction." *Central States,* 230 F.3d at 945. In *Central States*, a pension fund filed suit in Illinois against a parent Canadian company (REE) for withdrawal liability under the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). The plaintiff argued that the defendant was liable for the actions of its subsidiary (ICTL), which went out of business, stopped contributing to the fund, and thus incurred MPPAA withdrawal liability. *Id.* at 938. The defendant was the corporate "great-grandparent" of the subsidiary and provided it with administrative services, including *payroll services*. *Id.* at 937, 945-46. The Seventh Circuit affirmed the district court's granting of the defendant's motion to dismiss for lack of personal jurisdiction. The court adopted the rule that "a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without

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[1] Defendant originally moved for dismissal of the entire action as it was the only named defendant. Plaintiff has recently filed a First Amended Complaint adding Lane Bryant, Inc. and Charming Shoppes, Inc. as defendants. *See* Docket No. 32. To date, those defendants have not been served. If they are served, dismissal will be sought on various grounds, including lack of personal jurisdiction (as to parent corporation Charming Shoppes, Inc.) and the pendency of an identical action filed by Plaintiff in state court (as to Plaintiff's actual employer, Lane Bryant).

calling into question the separateness of the two entities for purposes of personal jurisdiction." *Id.* at 945. The *Central States* court reasoned:

> The basis for this proposition is much the same as for the more general principle that jurisdiction over a parent cannot be based merely on jurisdiction over a subsidiary. Parent corporations regularly provide certain services to their subsidiaries. Such parents do not expect that performing these activities may subject them to liability because of the actions of the subsidiaries. Thus, such standard services are not sufficient minimum contacts to support the exercise of jurisdiction.

Id. at 945. The court concluded that "Illinois could not constitutionally exercise jurisdiction on the basis of these administrative services that REE provided to ICTL." *Id.* at 946.

Here, as in *Central States,* Defendant provided certain administrative services, including payroll services, to Lane Bryant, its sister corporation. Lane Bryant paid Defendant a fee for these services. *See* Declaration of Elizabeth A. Ackley ("Ackley Decl."), ¶ 3. Under the rule set forth in *Central States*, the provision of such services is simply not a basis for personal jurisdiction. *Cf. Hukill v. Auto Care, Inc.*, 192 F.3d 437, 443 (4th Cir. 1999) (noting that affiliated corporations' purchase of administrative services, including payroll services, from sister corporation "is not unusual in today's business climate and is of no consequence" in determining that corporations were not "integrated employer" and administrative services corporation was not the plaintiff's employer).

Plaintiff fails to address this authority in arguing that the sheer volume of payroll that Defendant provided somehow transforms Defendant's insufficient minimum contacts into a basis for personal jurisdiction. *See, e.g.,* Opp., pg. 6 ("Defendant has been sending millions of dollars weekly into California . . . [and] purposefully directing into California thousands of wage statements/paycheck paystubs"). But, Plaintiff again cites no authority for this argument. Rather, courts have repeatedly declined to exercise personal jurisdiction over companies that provide payroll services. *See, e.g., Central States,* 230 F.3d at 945-46; *Kyle v. CRW Affiliated P'ship,* 2001 WL 899639 (S.D. Ind. 2001) (dismissing company from action for lack of personal jurisdiction where company "issued . . .paychecks" for actual employer and provided "payroll services").

The fact that Defendant's administrative services include legal consultation is also insufficient grounds for jurisdiction. *See, e.g., Calvert v. Huckins,* 875 F.Supp. 674, 678 (E.D. Cal. 1995) (finding that parent company's provision of legal services to subsidiary is "simply too insubstantial to warrant a finding of general jurisdiction" over the parent). In fact, courts have so uniformly rejected an "administrative services" basis for personal jurisdiction that even an entity's provision of a whole host of services beyond payroll and legal services does not create jurisdiction. *See Spiegel v. Shulmann*, 2006 WL 3483922, at *11 (E.D.N.Y. Nov. 30, 2006) (concluding that no personal jurisdiction existed over out-of-state company despite its provision of administrative services that included "accounts payable, accounts receivable, bookkeeping, payroll, marketing, legal services, training, employee health insurance, and the like"); *Dunn v. Svitzer*, 885 F.Supp. 980, 988-89 (S.D. Tex.) (declining to exercise personal jurisdiction over parent company that provided "accounting, payroll, claims and risk management, reporting and data management services") (emphasis added).

Plaintiff also argues that general jurisdiction exists over Defendant in California because it allegedly "pays the employment taxes" of Lane Bryant employees. Opp., pg. 11. However, courts have held that the payment of payroll taxes in a state is insufficient to establish personal jurisdiction there. *See, e.g., Agnello v. Paragon Development, Ltd.*, 2008 WL 45260, at *5 (W.D. Pa. Jan. 2, 2008) (finding no personal jurisdiction over defendant in Pennsylvania despite defendant's issuance of paychecks in Pennsylvania, receipt of a state identification number for payment of *Pennsylvania taxes*, withdrawal of *state taxes* from paychecks, filing of quarterly and yearly state *tax reports*, and payment of *unemployment taxes* on workers' behalf).

III. PLAINTIFF'S VARIOUS PROPOSED THEORIES SEEKING TO IMPUTE LANE BRYANT'S CALIFORNIA CONTACTS TO DEFENDANT ALL FAIL

Plaintiff throws out various theories of jurisdiction, all based on the underlying, erroneous premise that Defendant's provision of administrative services to Lane Bryant creates a legally-significant relationship between the two corporations. Plaintiff boldly asserts that Defendant was the joint employer, "integrated enterprise," alter-ego, or parent of Lane Bryant such that Lane

Bryant's California contacts can be imputed to Defendant to establish personal jurisdiction. These theories are not viable as a matter of law and are not supported by any facts.

A. Defendant Was Not Plaintiff's Joint Employer.

Plaintiff contends that Defendant was her "joint employer" with Lane Bryant and thus should be subject to personal jurisdiction. To support this argument, she summarily asserts that "Defendant [was] the employer of Plaintiff, thus easily establishing personal jurisdiction . . . ." Opp., pg. 9. There is no authority for Plaintiff's blanket proposition that the mere pleading, without any supporting facts, that a defendant is one's employer subjects that defendant to jurisdiction. Such an approach ignores the longstanding crux of personal jurisdiction—an analysis of each defendant's specific contacts with the forum state. *See, e.g., International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 158 (1945). In fact, cases that have addressed a "joint employer" argument for personal jurisdiction have done so within recognized theories, specifically the alter ego and agency theories of jurisdiction discussed below.[2]

Even assuming that Defendant's purported status as Plaintiff's "employer" was sufficient to establish personal jurisdiction, Plaintiff alleges no facts that Defendant was her employer. The California Labor Code under which Plaintiff asserts her wage and hour claims does not specifically define the term "employer." *E.g., Singh v. 7-Eleven, Inc.*, 2007 WL 715488, at *6 (N.D. Cal. March 8, 2007).[3] California courts, however, have consistently recognized that the

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[2] To the extent Plaintiff equates her "joint employer" argument with an "integrated enterprise" theory of personal jurisdiction, Defendant addresses Plaintiff's "integrated enterprise" argument in the next section of the reply. *See* Opp., pg. 18 ("Defendant could likely be a joint employer or 'integrated enterprise' with CSI and/or Lane Bryant.")

[3] In determining whether a defendant is a joint employer under the Fair Labor Standards Act ("FLSA"), courts look to the "economic reality" behind the relationship and typically consider the following four factors: (1) the power to hire and fire the employees, (2) supervision and control of employee work schedules or conditions of employment, (3) determination of the rate and method of payment, and (4) maintenance of employment records. *Bonnette v. Cal. Health and Welfare Agency,* 704 F.2d 1465, 1470 (9th Cir. 1983), *disapproved of on other grounds in Garcia v. San Antonio Metro. Transit. Auth.*, 469 U.S. 528 (1985). The California Supreme Court has suggested, however, that the federal definition of "employer" is inapplicable under California law. *See Reynolds v. Bement,* 36 Cal.4th 1075, 1088 (2005). Even if applied here, Plaintiff again asserts no facts establishing any of these factors, and the evidence shows that these factors are not present.

principal test for determining the existence of an employment relationship is the right of control over the manner or means of accomplishing the work desired. *Isenberg v. California Employment Stabilization Comm'n*, 30 Cal.2d 34, 39 (1947); *Wickham v. Southland Corp.*, 168 Cal.App.3d 49, 54 (1985). Defendant exercises no control over Lane Bryant's operations and does not manage or direct the work of any California employees of Lane Bryant, including Plaintiff. *See* Sullivan Decl., ¶¶6-8. Rather, Lane Bryant owns and operates all Lane Bryant stores in California and was Plaintiff's sole employer. *See* Sullivan Decl., ¶10; Camoratto Decl., ¶4.

Finally, Defendant's provision of administrative services to Lane Bryant does not establish that it was a joint-employer of Lane Bryant's workers. *See, e.g., Maddock v. KB Homes, Inc.*, 2007 WL 4287627, at * 6 (Oct. 18, 2007) (finding that parent company's maintenance of a database of information on its subsidiary's employees and provision of shared payroll services were "as a matter of law insufficient to establish that [parent company] was plaintiff's joint employer under the [FLSA]"); *Singh*, 2007 WL 715488, at *6 (concluding that franchisor's "ministerial functions" in providing "all payroll functions, including keeping and generating time records; withholding and paying federal and state taxes, worker's compensation premiums, and EDD taxes; calculating, generating, and delivering the employees' paychecks" do not create an indicia of control sufficient to demonstrate that the franchisor is a joint employer for FLSA and California Labor Code claims); *Hukill*, 192 F.3d at 443 (noting that corporations' purchase of administrative services from sister corporation was of no consequence in determining that corporations were not single employer).

B. The "Integrated Enterprise" Theory Cannot Be Used to Establish Personal Jurisdiction.

Plaintiff further contends that Defendant is an "integrated enterprise" with Lane Bryant. The integrated enterprise theory, however, is a theory for establishing liability under federal anti-discrimination law over a related business entity and is *not* a basis for asserting personal jurisdiction. *See United Electrical v. 163 Pleasant Street Corp.*, 960 F.2d 1080, 1096 (1st Cir. 1992) (rejecting application of "integrated enterprise" theory to determine issues of personal

jurisdiction); *see also Russell v. Enter. Rent-A-Car Co. of Rhode Island*, 160 F. Supp 2d 239, 246 (D. R.I. 2001) (same).

The two "integrated enterprise" cases that Plaintiff cites in her Opposition, *Kang v. U. Lim America, Inc.*, 296 F.3d 810 (9th Cir. 2002) and *Parker v. Columbia Pictures Ind.*, 204 F.3d 326 (2nd Cir. 2000), both apply the integrated enterprise test to determine *liability* of a related business entity under Title VII and the ADA respectively–*not* personal jurisdiction over that entity. *See* Opp., pgs. 18-19. Specifically, these decisions hold that the employees of the actual employer and the related entity can be aggregated to meet the employee threshold for coverage under federal anti-discrimination statutes, such as the 15-employee requirement under Title VII. *See Kang,* 296 F.3d at 815-816; *Parker*, 204 F.3d at 341-42. Neither decision applies the integrated enterprise to determine personal jurisdiction.

Even assuming the integrated enterprise theory could be used to establish personal jurisdiction, Plaintiff has not alleged any facts sufficient to demonstrate personal jurisdiction under such theory. Plaintiff simply asserts that Defendant provides certain administrative services to Lane Bryant and that both companies share the identical location of their corporate headquarters, and then summarily concludes that "[u]nder such circumstances, it could certainly evidence common management and thus an integrated enterprise." *See* Opp., pg.19. Plaintiff's assertions are incorrect and irrelevant. First, Defendant and Lane Bryant do *not* share corporate headquarters. Lane Bryant is headquartered in Columbus, Ohio; Defendant is headquartered in Pennsylvania. *See* Ackley Decl., ¶2; Sullivan Decl., ¶ 3. Second, Defendant's mere provision of administrative services does not constitute "(1) interrelation of operations; (2) common management; (3) centralized control of labor relations; and (4) common ownership or financial control" such that Lane Bryant and Defendant could be considered an "integrated enterprise". *Kang,* 296 F.3d at 815; *see Hukill*, 192 F.3d at 443-44 (rejecting argument that defendant was "integrated employer" with sister corporation to whom it provided administrative services; *Maddock v. KB Homes,* 2007 WL 4287627, at *10-11 (same).

C. Defendant Is Not an Alter Ego of Lane Bryant.

Plaintiff has failed to put forth any evidence to support her alter ego theory of personal jurisdiction. Courts within this Circuit have uniformly held that the mere existence of a parent/subsidiary or affiliate relationship does not establish personal jurisdiction without the plaintiff first offering admissible evidence sufficient to make a prima facie "alter ego" showing. *See, e.g., AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996); *Transure, Inc. v. Marsh & McLennan, Inc.*, 766 F.2d 1297, 1299-1300 (9th Cir. 1985). To establish an alter ego relationship between companies, Plaintiff must demonstrate that (1) there is such unity of interest and ownership between the corporations that their separate personalities no longer exist, *and* (2) recognizing their separate corporate identities would result in fraud or injustice. *Amer. Tel. & Telegraph Co., v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 591 (9th Cir. 1996). Application of the alter ego doctrine is appropriate only when corporate formation has been used with the intent "to perpetrate a fraud, circumvent a statute, or accomplish some other wrongful or inequitable purpose." *Universal Paragon Corp. v. Ingersoll-Rand Co.*, 2007 WL518828, at *5 (N.D. Cal 2007), *citing Sonora Diamond Corp. v. Sup. Ct.*, 83 Cal. App. 4th 523, 538 (2000).

First, the alter ego theory does not apply here. Plaintiff's employer, Lane Bryant, is simply not a subsidiary of Defendant, and therefore Lane Bryant's California contacts cannot be imputed to Defendant under the parent-subsidiary context in which the alter ego theory is applied. Lane Bryant and Defendant are sister corporations and are both subsidiaries of Charming Shoppes, Inc. *See In re Ski Train Fire In Kaprun*, 2006 WL 538200 *3 (S.D.N.Y. 2006) (noting the lack of authority for applying the alter ego theory between "sister corporations").

Even if the alter ego theory could extend to sister companies, Plaintiff presents no evidence showing that there is a "unity of interest" between Defendant and Lane Bryant. "There is a presumption of corporate separateness that must be overcome by clear evidence that the parent in fact controls the activities of the subsidiary." *Cavert v. Hickins*, 875 F. Supp. 674, 679 (E.D. Cal. 1995). Here, there is not even an allegation (let alone evidence) that Defendant, who is akin to a mere third-party service provider, in any way "controls" the activities of Lane Bryant. Plaintiff summarily asserts that Defendant is playing a "corporate shell game made to cause

confusion ... ." Opp., pg. 20. Plaintiff has not presented any alleged facts, much less actual evidence, demonstrating a singular corporate identity, such as "inadequate capitalization, commingling of assets, [or] disregard of corporate formalities." *Katzir's Floor & Home Design, Inc. v. M-MLS.com*, 394 F.3d 1143, 1149 (9th Cir. 2004). Rather, Defendant and Lane Bryant have maintained separate corporate identities. Defendant has no ownership interest in Lane Bryant. *See,* Sullivan Decl., ¶ 6-8. All Lane Bryant stores in California are owned and operated by Lane Bryant, not Defendant. *See, id.* at ¶ 8. Defendant does not exert management control over Lane Bryant operations. *See, id.* at ¶ 6. Defendant does not hire, manage, or direct the work of Lane Bryant employees. *See,* Camoratto Decl. ¶ 6. Defendant is headquartered and incorporated in Pennsylvania, and Lane Bryant is headquartered in Ohio. *See* Ackley Decl., ¶ 2; Sullivan Decl., ¶ 3. Furthermore, Lane Bryant and Defendant observe all corporate formalities, including conducting separate regular board meetings. *See,* Sullivan Decl. ¶ 4.

Despite Lane Bryant and Defendant's corporate independence, Plaintiff once again relies on Defendant's provision of administrative services to Lane Bryant as "proof" of an alter ego relationship (and, presumably, personal jurisdiction). As discussed above, however, courts have consistently held that such services are a common and accepted corporate practice among related entities and not a basis for piercing the corporate veil. *See, e.g. Central States Southwest,* 230 F.3d at 945 (adopting rule that a corporate parent may provide administrative services for its subsidiary in the ordinary course of business without calling into question the separateness of the two entities for purposes of personal jurisdiction); *Calvert,* 875 F.Supp. at 678 (addressing alter ego doctrine and finding insufficient evidence to pierce corporate veil where the parent provided legal services to the subsidiary); *Maddock*, 2007 WL 4287627, at *13-14 (concluding that the fact that parent provided payroll processing services to its subsidiaries was insufficient to establish a unity of interest under alter ego standard).

Even if Plaintiff could establish facts supporting the first prong of the alter ego doctrine, she has made no showing that recognition of Defendant and Lane Bryant's separate identities would result in fraud or injustice. For a court to pierce the corporate veil it must determine that there is bad faith conduct on the part of the parent corporation that would otherwise remain

without remedy. *Nordberg v. Trilegiant Corp.*, 445 F.Supp.2d 1082, 1102 (N.D. Cal. 2006) (J. Patel).

Here, Plaintiff does not identify any actual inequitable result that might follow from recognizing Defendant's corporate separateness. Plaintiff speculates that Defendant, in asserting lack of personal jurisdiction, is perpetrating a scheme to "require low wage California employees to travel to Pennsylvania to file suit against Defendant for any wage payment problems California employees suffer." Opp., pg. 17. Plaintiff has not alleged any facts indicating such a "scheme," and there are none. Defendant is a separate corporation that provides bona fide administrative services to other operating subsidiaries of Charming Shoppes, Inc., including Lane Bryant. Defendant's existence in no way prevents Plaintiff from filing suit in California on her wage and hour claims against her actual employer, Lane Bryant. Indeed, Plaintiff has filed a purported class action in San Francisco County Superior Court against Lane Bryant alleging the very same causes of action. Huang Dec. ¶ 2. Lane Bryant has filed an answer in the Superior Court action and has not challenged personal jurisdiction. Declaration of Albert Y. Huang in Support of Reply, ("Huang Reply Decl."), ¶ 2. Thus, Plaintiff can readily proceed with the class action she filed against her real employer, Lane Bryant. Recognizing the fact that Defendant is a separate corporate entity from Lane Bryant certainly does not result in any inequity to Plaintiff or the putative class.

D. Lane Bryant Was Not an Agent of Defendant.

Plaintiff also argues that Lane Bryant was an agent of Defendant in California. To establish an agency relationship, Plaintiff must show that Defendant's control over Lane Bryant was "so pervasive and continual" that Lane Bryant may be considered nothing more than an "instrumentality" of Defendant. *Sonora Diamond,* 83 Cal. App. 4th at 541. Control is the key characteristic of agency, and Plaintiff must show that Defendant has "taken over performance of the subsidiary's day-to-day operations." *Id.* Plaintiff neither pleads nor presents any facts demonstrating such control by Defendant over Lane Bryant. Rather, Plaintiff resorts to the absurd argument that an agency relationship exists because Defendant is "recycling money it receives from thousands of California workers." Opp., pg. 13.

However, it is Plaintiff who is "recycling" the same argument that Defendant's provision of administrative services, specifically payroll, is a sufficient basis for personal jurisdiction. The fact that Defendant processes Lane Bryant's payroll is not an indicia of "control" and certainly is not evidence that Defendant controls Lane Bryant's daily operations. *See Maddock,* 2007 WL 4287627, at *10 (stating that the fact that KB Homes provided payroll processing services to its subsidiaries "does not establish that KB Homes financed the paychecks for its subsidiaries' employees"). Indeed, Lane Bryant is not performing *any* services for Defendant, let alone services "sufficiently important to [Defendant] that if it did not have a representative to perform them, [Defendant] . . . would undertake to perform similar services." *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements, Ltd.,* 328 F.3d 1122, 1135 (9th Cir. 2003) (noting that the agency test permits imputation of contacts only where the subsidiary was either "established for, or is engaged in, activities, that but for the existence of the subsidiary, the parent would have to undertake itself"). Here, there is simply no evidence of such a relationship between Lane Bryant and Defendant.

IV. DEFENDANT HAS NOT DIRECTED ANY FRAUD INTO CALIFORNIA

Plaintiff further contends that Defendant is subject to personal jurisdiction in California because it purportedly directed "fraudulent activities" into California when it allegedly failed to comply with California Labor Code Section 226. *See* Opp., pgs. 14-15. Plaintiff first argues that Defendant was Plaintiff's employer, but Plaintiff then argues that if that is not the case, "Defendant has intentionally made false statements regarding who is the actual employer … ." Opp., pg. 14.

The only evidence Plaintiff cites for this sweeping statement is Plaintiff's pay stub which identifies Defendant's name. However, the wage statement that Plaintiff filed in support of her Opposition nowhere states that Defendant is her employer. Rather, Plaintiff's counsel apparently assumed Defendant employed Plaintiff based upon one of the requirements of Labor Code Section 226(a). Regardless of this (erroneous) assumption, the issue before the Court is whether personal jurisdiction exists over Defendant, and Plaintiff's attempt to establish personal jurisdiction by converting an alleged violation of Section 226(a) *by Lane Bryant* into an alleged

tort claim *by Defendant* is simply unavailing. First, Plaintiff is once again seeking to base personal jurisdiction on the fact that Defendant provides payroll services for Lane Bryant—an argument that has been emphatically rejected by the courts. Second, Section 226 does not even regulate Defendant's conduct, because Defendant is merely the provider of payroll services for Lane Bryant. Rather, the plain language of Section 226 establishes requirements for the *employer*— Lane Bryant, not Defendant. To the extent Plaintiff takes issue with the substance of her pay stub, that is an issue to be taken up with her employer Lane Bryant (and, indeed, Plaintiff has a pending lawsuit in San Francisco Superior Court in which she has the opportunity to do so). Third, Plaintiff can point to no evidence that Defendant ever affirmatively represented to Plaintiff that it was her employer, much less that all of the elements of fraud can be established.[4] Thus, Defendant did not direct any fraudulent activity into California so as to warrant the exercise of personal jurisdiction.

Even if Section 226 applied to Defendant, this would not establish personal jurisdiction. As discussed above, Plaintiff's "fraudulent activities" argument is based exclusively on alleged violations of Section 226. However, the Ninth Circuit has repeatedly rejected this argument by holding that statutory liability may not be used "as a substitute for personal jurisdiction." *American Telephone*, 94 F.3d at 590-591 (9th Cir. 1996) (holding that liability of a non-resident parent company under the statute in question could not substitute for personal jurisdiction because "liability and jurisdiction are independent"); *see also Sher v. Johnson*, 911 F.2d 1357, 1365 (9th Cir. 1990) ("Liability depends on the relationship between the plaintiff and the defendants and between the individual defendants; jurisdiction depends only upon each defendant's relationship with the forum.").

V. DEFENDANT HAS NOT WAIVED PERSONAL JURISDICTION AS A DEFENSE

Plaintiff argues that Defendant's failure to raise personal jurisdiction as a defense in a prior wholly unrelated state court action filed in 2003 (which also named another subsidiary,

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[4] Plaintiff's suggestion that she did not know she was employed by Lane Bryant is meritless. She worked at a Lane Bryant store, signed documents affirming that she worked for Lane Bryant, and received a Lane Bryant handbook

Fashion Bug of California, Inc.) somehow constitutes a waiver of the defense in this action. Opp., pgs. 7-8. Plaintiff cites no authority whatsoever for this novel theory of perpetual waiver and, not surprisingly, there is none. To the contrary, in *Calvert v. Huckins*, the district court found that the fact a parent corporation had been sued five separate times in California courts, had a judgment entered against it in one case, and had itself brought an action in California did not establish personal jurisdiction. As to the prior lawsuits against the parent, the court held: "[a]s this case demonstrates, it is common practice for plaintiffs to name a parent company when it brings an action against a subsidiary. This by itself shows no continuous and substantial contact with California." 875 F. Supp. at 677. Defendant has timely and properly asserted the defense of lack of personal jurisdiction in this action through a motion to dismiss under Rule 12(b)(2), and clearly has not waived the defense in this action.

VI. PLAINTIFF HAS NOT ESTABLISHED A COLORABLE SHOWING OF PERSONAL JURISDICTION TO JUSTIFY DISCOVERY ON THIS ISSUE

In a final attempt to maintain this action against Defendant, Plaintiff seeks the Court's permission to conduct discovery as to personal jurisdiction. In order to obtain discovery on jurisdictional facts, Plaintiff must at least make a "colorable" showing that the Court can exercise personal jurisdiction over Defendant. *Central States*, 230 F.3d at 946, *Mitan v. Feeney*, 497 F.Supp.2d 1113, 1119 (C.D. Cal. 2007). Specifically, Plaintiff seeks to conduct discovery as to "other administrative functions" that Defendant provides to Lane Bryant and "the parent subsidiary relationship that is admitted by Defendant." Opp., pg. 19.[5] But, as discussed above, neither Defendant's provision of administrative services to Lane Bryant nor Defendant's status as a sister corporation of Lane Bryant constitute sufficient contacts for the exercise of personal jurisdiction as a matter of law. Thus, any discovery on these issues would be entirely irrelevant to the instant motion. *See Central States*, 230 F.3d at 947 (affirming *denial of discovery on jurisdiction* because facts regarding parent company's corporate affiliation with employer, without any showing of "an usually high degree of control," and its provision of "standard

[5] As the evidence makes clear, Defendant admits no such relationship with Lane Bryant, its sister corporation.

administrative services" to employer were not sufficient to show a colorable basis for jurisdiction). The discovery that Plaintiff seeks could not alter the conclusion that this Court lacks personal jurisdiction over Defendant.

Moreover, Plaintiff's speculation and conclusory statements about Defendant's contacts with California are not sufficient grounds for jurisdictional discovery. *See, e.g.*, *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1160 (9th Cir. 2006) (affirming denial of right to conduct jurisdictional discovery where "plaintiff's claim of personal jurisdiction appears to be both attenuated and based on bare allegations in the face of specific denials made by the defendants"); *Carefirst of Maryland, Inc. v. Carefirst Pregnancy Centers, Inc.*, 334 F.3 390, 402-403 (stating that a court is within its discretion in denying jurisdictional discovery when a plaintiff offers only speculation or conclusory assertions about contacts with a forum state). Here, Plaintiff offers only speculation that Defendant is playing a "corporate shell game" and furthering a "perfect scheme" to avoid jurisdiction. Opp., pgs. 13, 20. The Court should ignore these bare allegations and deny Plaintiff's request to conduct an irrelevant "fishing expedition" into issues of personal jurisdiction. *Rich v. KIS Cal., Inc.*, 121 F.R.D. 254, 259 (M.D.N.C. 1988).

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VII. CONCLUSION

Plaintiff's opposition is long on rhetoric and short on relevant facts or law. Plaintiff has failed to make a *prima facie* showing of jurisdictional facts to withstand Defendant's motion to dismiss. Defendant has minimal contact with California and only provides administrative services to Lane Bryant. These services do not evidence "substantial" or "continuous and systematic" contacts with California, and do not create any joint or integrated employer, alter ego, or agency relationship. Because this Court lacks jurisdiction over Defendant, the motion to dismiss must be granted.

Dated: January 28, 2008

MORGAN, LEWIS & BOCKIUS LLP

By /S/
Albert Huang
Specially Appearing for Defendant
CHARMING SHOPPES OF DELAWARE, INC.